IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 79.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695, A. F. L.; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, A. F. L.; and BUILDING & CONSTRUCTION LABORERS UNION, LOCAL 392, A. F. L.,
Petitioners,

v.

VOGT, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin.

BRIEF FOR THE PETITIONERS.

DAVID PREVIANT,
511 Warner Theatre Building,
Milwaukee, Wisconsin,
Counsel for Petitioners.

Of Counsel:
PADWAY, GOLDBERG & PREVIANT,
DAVID LEO UELMEN,
HUGH HAFER,
511 Warner Theatre Building,
Milwaukee, Wisconsin.

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OPINIONS BELOW.

The memorandum opinion of the Circuit Court of Waukesha County, Wisconsin (R. 1-2) is unreported. The original opinion of the Wisconsin Supreme Court (R. 22-28) is reported in 270 Wis. 315, 71 N. W. 2d 359. The rehearing opinion (R. 30-46) is reported in 270 Wis. 321a, 74 N. W. 2d 749.

JURISDICTION.

The Wisconsin Supreme Court, on June 28, 1955, entered a mandate reversing the judgment of the Circuit Court for Waukesha County (R. 28). A motion for rehearing was filed by the Respondent herein on July 18, 1955 (R. 28) and was granted on October 5, 1955 (R. 29). On February 7, 1956, the Wisconsin Supreme Court withdrew its original mandate and affirmed the judgment of the Circuit Court (R. 41). The instant petition was filed on May 4, 1956, and was granted October 8, 1956 (R. 47). The jurisdiction of this Court rests on 28 U. S. C. 1257 (3).

QUESTION PRESENTED.

Whether peaceful picketing, having as its purpose the publication of the facts of a labor dispute and the organization of non-union employees, preceded by solicitation of such non-union employees and conducted on a town road bordering the situs of the dispute, and which is unaccompanied by demands of any kind upon the employer, is protected under the First and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED.

First Amendment.

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment.

Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

The facts in this case, all of which are undisputed, are as follows: Respondent, Vogt, Inc. (hereinafter referred to as "Vogt") operates a gravel pit in the Town of Oconomowoc, Waukesha County, Wisconsin (R. 3, 12, 16), employing ten to fifteen men (R. 5, 16). In the fall of 1953 (R. 9) and again in April of 1954 (R. 8, 10, 11) representatives of the Petitioners (hereinafter referred to as the "Unions") discussed the advantages of union affiliation with several of Vogt's employees and solicited their membership (R. 5, 8-11, 12, 16). Vogt's employees declined the Unions' offer of membership and indicated a desire to remain non-union (R. 5, 16).

The Unions commenced peaceful picketing on a public road bordering Vogt's gravel pit, where such employees worked, on July 13, 1954 (R. 4, 12, 16). The sign carried by the picketers stated:

> "The men on this job are not 100% affiliated with the A. F. of L." (R. 4, 12, 16).

No demands of any kind were made upon Vogt and the picketing was at all times peaceful (R. 25).

Some truck drivers refused to make deliveries through the picket line, as a result of which Vogt was required to use his own trucks (R. 5, 16). It was stipulated between the parties that the present record contains all of the facts and evidence which could be adduced upon a trial on the merits (R. 20).

Vogt filed a complaint in the Waukesha County Circuit Court demanding that a permanent injunction be issued against the picketing. It was alleged in the complaint that the picketing was for the unlawful purpose of compelling Vogt to interfere with its employees' right of self-organization (R. 5-6); and that the picketing was unlawful because no labor dispute, as defined by state statute,[1] existed (R. 6).

The Unions' answer denied that the picketing was being carried on for an unlawful purpose (R. 12). It was affirmatively alleged that a labor dispute existed between the Unions and the non-union employees of Vogt and that the Unions' activities were for a lawful purpose, protected under the First and Fourteenth Amendments of the Federal Constitution (R. 14).

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[1] Wis. Stat., Sec. 103.535 (1953), provides:

"It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employes, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute, as defined in subsection (3) of Section 103.62, exists between such employer and his employes or their representatives."

Wis. Stat., Sec. 103.62 (3) (1953), provides:

"The term 'labor dispute' means *any controversy between an employer and the majority of his employes* in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith." (Emphasis ours.)

The circuit court found that the purpose of the picketing was to induce Vogt's employees to affiliate with the picketing Unions (R. 16); it refused to find that the picketing was being conducted for an unlawful purpose (R. 1). A permanent injunction restraining all peaceful picketing was nevertheless issued on November 9, 1954 (R. 18-19), because no labor dispute as defined by state law existed.[2]

The court below, in a unanimous opinion rendered on June 28, 1955, affirmed the circuit court's finding of fact; and stated that a finding of unlawful purpose could not be made on the facts found by the circuit court (R. 25). It therefore held that under the decision of this Court in **A. F. of L. v. Swing**, 312 U. S. 321, the Unions' activities were constitutionally protected and could not be enjoined (R. 26-27). The judgment of the circuit court was accordingly reversed with directions to dissolve the injunction and dismiss the complaint (R. 28).

On October 5, the court below granted a motion for rehearing filed by Vogt (R. 28-29). Although no additional evidence was introduced, the court below, on February 7, 1956, withdrew its original opinion and mandate and affirmed the judgment of the circuit court (R. 41).

The court below reasoned that the picketing was not directed at Vogt's employees because their membership has been previously solicited. It assumed that only a small part of the public travelled the road in question, concluding from this that the picketing was not directed at the general public. At this juncture, it became "clear" to the court below that the "only" purpose of the picketing was to "influence" those delivering materials to Vogt's gravel pit in the "hope" that they would refuse to serve Vogt (R. 36). Vogt's only choice, concluded the court below,

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[2] The Circuit Court relied exclusively on the statutory provisions reproduced in Note 1, supra (R. 1-2, 16-17).

was to suffer a loss of profits or interfere with its employees' right of self-organization. On this basis, the court reversed its own and the circuit court's findings to the contrary, withdrew its earlier unanimous decision, and, with one judge dissenting, the circuit court's judgment granting a permanent injunction was affirmed.[3]

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[3] The Unions were permanently enjoined and restrained:

"(a) From directly or indirectly establishing and maintaining, or causing to be established or main- [fol. 27] tained, any pickets or patrols in front of plaintiff's entrance ways, driveways, on private and public roads leading to plaintiff's business establishment, and generally at or near plaintiff's establishment located in the Town of Oconomowoc, Waukesha County, State of Wisconsin.

"(b) From displaying or causing to be displayed, anywhere at or near plaintiff's business establishment or on the roads and highways leading thereto, any signs or placards bearing the legend or legends as described in the complaint herein, or stating or intending to cause to be understood that there is a labor dispute in existence between the plaintiff and its employees, or between the plaintiff and any of the defendants.

"(c) From inducing or persuading, or causing others to induce or persuade, trucking, cartage and other transportation companies and their officers, agents and employees to decline to deliver, haul or transport goods and supplies to and from the plaintiff's business establishment" (R. 19).

SUMMARY OF ARGUMENT.

In this case, the task is one of applying settled principles of law to undisputed facts. Such a record should be treated as presenting a question of law. **Dennis v. United States**, 341 U. S. 494, 515. But if the question be considered one of fact, this Court must nevertheless undertake an independent examination of the record. **Drivers Union v. Meadowmoor Co.**, 312 U. S. 287, 293. This for the reason that the Unions' timely claim to First Amendment protection is dependent upon the conclusion to be drawn from the undisputed facts in this case.

In the United States freedom of expression is the rule, restraint the exception. Legislative or judicial action restraining freedom of speech can be defended only on the ground that an exception obtains in the given case. Certainly, no deference to the findings of a state court should be accorded in cases presenting a substantial claim to First Amendment guarantees. **Thomas v. Collins**, 323 U. S. 516, 529-30.

Peaceful picketing has been uniformly held to be a constitutionally protected mode of communication since the decision of this Court in **Senn v. Tile Layers Union**, 301 U. S. 468, 478. The only cases in which restraint has been permitted by this Court involved violent picketing, picketing accompanied by unlawful demands upon an employer, and picketing having no economic nexus with the labor dispute. None of these exceptions are applicable in the instant case for the picketing in the case at bar was peaceful, unaccompanied by demands of any kind, and occurred at the site of the dispute.

The principal activities engaged in by the Unions, solicitation and peaceful picketing, are rights guaranteed under the First and Fourteenth Amendments. The only inference which has any logical connection with these proven facts

is that the Unions wanted the non-union employees to affiliate with them. Furthermore, it makes a mockery of constitutionally protected rights to predicate, as the court below did, a finding of unlawful purpose upon their exercise.

Whether many or few would have occasion to observe the picketers is totally irrelevant. The right to speak freely is not dependent upon a traffic count test. Insofar as the size of a speaker's audience is relevant, this Court has indicated that only when the size of the audience is artificially **increased** restraint may be appropriate. Compare: **Kovacs v. Cooper**, 336 U. S. 77, with **Saia v. New York**, 334 U. S. 558.

Incidental economic loss which may have occurred in no way aids those having the burden of proving that the peaceful picketing was for an unlawful purpose. Economic loss is germane to the right to initiate an action in the courts, not to the question of whether the burden of proof has been sustained.

Since the record is devoid of either allegation or proof that a single unlawful act was committed or demand made by the Unions, Vogt did not begin to meet its heavy burden of demonstrating that the picketing was for an unlawful purpose. The inferences drawn by the court below were, in every sense of the words, insubstantial and spurious.

The constitutional right to engage in peaceful picketing, irrespective of a dispute between an employer and his employees, was expressly affirmed by this Court in **Bakery Drivers Local v. Wohl**, 315 U. S. 769, and **A. F. of L. v. Swing**, 312 U. S. 321. We believe the decisions in the **Swing** and **Wohl** cases to be dispositive of the question here presented. Those decisions should be re-affirmed and the judgment of the court below reversed.

ARGUMENT.

I. This Court Is Not Bound by the Conclusion of the Court Below That the Peaceful Picketing at the Situs of the Dispute Was to Accomplish an Unlawful Purpose; But, Rather, Has the Power and Duty to Make Its Own Findings When, as Here, Petitioners' Constitutional Rights Depend Upon Conclusions Drawn From Undisputed Evidentiary Facts.

The trial court and seven justices of the Wisconsin Supreme Court in their first opinion made the unqualified finding that the peaceful picketing was for a lawful purpose. On rehearing, six of the Wisconsin Supreme Court justices, on the identical record, changed their minds and favored the imputation of sinister motivations. Expressed in another way, out of a total of fifteen judicial votes cast during the course of the litigation below, only six votes were cast in favor of a finding of unlawful purpose while nine votes had previously been cast in favor of a finding of lawful purpose.[4] Yet the Unions stand before this Court permanently restrained from publicizing, through the medium of peaceful picketing, the undisputed fact that the employees of Vogt are non-union. Whether this restraint impairs the freedom of speech guaranteed by the Federal Constitution is the question before this Court.

A. The Finding of the Court Below With Respect to Purpose Should Be Treated as a Conclusion of Law.

Without exception, the evidentiary components of the record are undisputed; hence, no question of fact, as that term is traditionally used, is presented in this case. An

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[4] Compare *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590, 600, with *Baumgartner v. United States*, 322 U. S. 665, 670, for a treatment of concurring findings by lower courts. It must be noted, however, that in this case confusion rather than concurrence reigned in the courts below.

"'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights." **Watts v. Indiana**, 338 U. S. 49, 51. See also: **Baumgartner v. United States**, 322 U. S. 665, 670-71; Morris, **Law and Fact**, 55 Harv. L. Rev. 1303, 1329 (1942). A finding of unlawful purpose, as much as a finding of clear and present danger, bears "the marks of a 'question of law.'" **Dennis v. United States**, 341 U. S. 494, 515. Therefore, there is no merit to any suggestion that this Court is bound by the findings of the court below as to the purpose of the Unions' picketing.

B. **If the Finding With Respect to Purpose Is Treated Here as a Finding of Fact, Such Finding Is Nevertheless Subject to Independent Review and Evaluation by This Court.**

Even if the question be considered one of fact (See: **Norris v. Alabama**, 294 U. S. 587, 589-90) it is subject to full review in this court. As stated in **Fiske v. Kansas**, 274 U. S. 380, 385-86:

> ". . . . this court will review the findings of fact by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts."

Similarly, this Court stated in **Drivers Union v. Meadowmoor Co.**, 312 U. S. 287, 293:

> "[It] is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the

ultimate power to search the records in the state courts where a claim of constitutionality is effectively made."

This Court frequently has been required to make an independent evaluation of the certified record in order to determine whether a denial of federally-protected rights has occurred:

Abridgment of voting rights: **Smith v. Allwright**, 321 U. S. 649, 662.

Coerced confessions, e. g.: **Haley v. Ohio**, 332 U. S. 596, 599; **Malinski v. New York**, 324 U. S. 401, 404; **Ashcraft v. Tennessee**, 322 U. S. 143, 148.

Coerced tax payments: **Ward v. Love County**, 253 U. S. 17, 22-23.

Confiscatory tax rate: **United Gas Public Service Co. v. Texas**, 303 U. S. 123, 143.

Contempt convictions: **Craig v. Harney**, 331 U. S. 367, 373; **Pennekamp v. Florida**, 328 U. S. 331, 335; **Bridges v. California**, 314 U. S. 252, 270-71.

Criminal syndicalism convictions: **Herndon v. Lowry**, 301 U. S. 242, 249, 259-61; **Fiske v. Kansas**, 274 U. S. 380, 385-86.

Discrimination in the selection of juries, e. g.: **Hernandez v. Texas**, 347 U. S. 475, 480-81; **Pierre v. Louisiana**, 306 U. S. 354, 358; **Norris v. Alabama**, 294 U. S. 587, 589-90.

Disorderly conduct conviction: **Niemotko v. Maryland**, 340 U. S. 268, 271-72. See also: **Terminiello v. Chicago**, 337 U. S. 1, 6.

Effect of foreign decree: **United States v. Pink**, 315 U. S. 203, 217-18.

Exemption from state taxation: **Hoover & Allison Co. v. Evatt**, 324 U. S. 652, 659; **Great Northern R. Co. v. Washington**, 300 U. S. 154, 166; **Johnson Oil Ref. Co. v. Oklahoma**, 290 U. S. 158, 159-60; **First Nat. Bank v. Hartford**, 273 U. S. 548, 552.

Existence of a contract, e. g.: **Indiana ex rel. Anderson v. Brand**, 303 U. S. 95, 100; **United States Mortg. Co. v. Matthews**, 293 U. S. 232, 236-37; **Coolidge v. Long**, 282 U. S. 582, 597.

Full faith and credit: **Adam v. Saenger**, 303 U. S. 59, 64.

Labor dispute statute violating due process of law: **Truax v. Corrigan**, 257 U. S. 312, 324.

Peonage law: **Pollack v. Williams**, 322 U. S. 4, 13.

Purpose of picketing: **Plumbers Union v. Graham**, 345 U. S. 192, 197.

Religious as distinguished from commercial nature of publications: **Follett v. McCormick**, 321 U. S. 573, 576-78; **Jamison v. Texas**, 318 U. S. 413, 416; Cf. **Jones v. Opelika**, 316 U. S. 584, 598; **Largent v. Texas**, 318 U. S. 418, 422.

Tariff rates: **Kansas City Southern R. Co. v. C. H. Albers Commission Co.**, 223 U. S. 573, 591.

Violation of alien property laws: **Oyama v. California**, 332 U. S. 633, 638-40; **Morrison v. California**, 291 U. S. 82, 90, 94.

Violent picketing: **Milk Wagon Drivers v. Meadowmoor Dairy Co.**, 312 U. S. 287, 293-94.

See also: **The Federal Courts and the Federal System**, Hart & Wechsler, pp. 465-73, 527-47 (1953); Note, 55 Harv. L. Rev. 644 (1942).

And where, as here, the facts are undisputed[5] this Court "must analyze the facts . . . and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state supreme court in this regard." **Truax v. Corrigan**, 257 U. S. 312, 324. See also: **Craig v. Harney**, 331 U. S. 367, 375; **Pennekamp v. Florida**, 328 U. S. 331, 335, 368; **Bridges v. California**, 314 U. S. 252, 274, 278; **Pierre v. Louisiana**, 306 U. S. 354, 360; **Herndon v. Lowry**, 301 U. S. 242, 249; **Fiske v. Kansas**, 274 U. S. 380, 386.

But whether the question presented by this record be considered one of fact, law or mixed is not controlling. It is a mere truism to state that picketing for an unlawful purpose may be enjoined; that coerced confessions may not be used; or that systematic exclusion of Negroes from a jury will void a conviction. In all of these cases, and in many others, the substantive right guaranteed by the Federal Constitution is ultimately dependent upon the conclusion drawn from facts which are frequently undisputed. In such cases, this Court must independently decide whether a denial, either express or in substance, of constitutional right has occurred.

II. Whatever Presumptions May Favor State Action in the Ordinary Case, Such Presumptions Are Inapplicable When a Substantial Claim to First Amendment Rights Is Raised.

Considerations of policy springing from our federal system and from our constitutional separation of powers

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[5] The court below, in reversing the trial court's finding that the picketing was for organizational purposes, concluded "a *de novo* determination of the Unions' purpose was permissible. This for the reason "that where the question presented is one of applying the law to the undisputed facts we are not bound by the trial court's findings" (R. 37). With equal force it follows that the Unions' purpose can be "as readily determined here as in a state court." Compare: *Adam v. Saenger*, 303 U. S. 59, 64. See also: Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 121-22.

have been crystallized in the rule that a statute is presumed to be constitutional. The presumption is a rebuttable one of fact. But not infrequently contravailing considerations of equal importance operate to exclude the use of this presumption. Particularly, though not exclusively, in cases involving the First Amendment has an equivalency been expressed:

"[Doubts] and difficulties * * * arise frequently when this Court is obliged to give definiteness to 'the vague contours' of Due Process or, to change the figure, to spin judgment upon State action out of that gossamer concept." **Haley v. Ohio**, 332 U. S. 596, 602 (Frankfurter, J., concurring). But "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." **Burstyn v. Wilson**, 343 U. S. 495, 503. "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties—the phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of these rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties." **Schneider v. Irvington**, 308 U. S. 147, 161.

Solicitous concern for the liberties of speech and press has caused this Court to state that freedom of speech is in a "preferred position";[6] its restraint is the "exception rather than the rule";[7] it is to be "guarded with a jealous

[6] *Kovacs v. Cooper*, 336 U. S. 77, 88; *Saia v. New York*, 334 U. S. 558, 561; *Marsh v. Alabama*, 326 U. S. 501, 509, 510; *Follett v. McCormack*, 321 U. S. 573, 575; *Murdock v. Pennsylvania*, 319 U. S. 105, 115.

[7] *Herndon v. Lowry*, 301 U. S. 242, 258; *Burstyn v. Wilson*, 343 U. S. 495, 503.

eye";[8] "mere legislative preferences" may not suffice when the First Amendment guarantees are involved;[9] and that in "borderline instances" the doubt is to be resolved in favor of freedom of speech.[10] We do not understand these indications of constitutional stewardship to mean that a statute touching upon freedom of speech is presumptively invalid or that the First Amendment is more important than other portions of the Bill of Rights. But they do indicate that a presumption necessarily exists in favor of the exercise of these freedoms. And when a legislative policy abridging the freedoms of speech and press is before the bar of this Court, it must stand or fall on its merits, without reliance upon the presumption of constitutionality. **Thomas v. Collins**, 323 U. S. 516, 529-30; **United States v. C. I. O.**, 335 U. S. 106, 140 (concurring opinion). See also: **West Virginia State Bd. v. Barnette**, 319 U. S. 624, 639; Lusky, **Minority Rights and the Public Interest**, 52 Yale L. J. 1, 19-20 (1942); Note, 40 Col. L. Rev. 531 (1940). Substantially the same view has also been expressed in cases dealing with state tax statutes which purport to levy a tax, in excess of the costs of inspection, upon imports and exports. **Great Northern R. Co. v. Washington**, 300 U. S. 154, 163, 168; **D. E. Foote & Co. v. Stanley**, 232 U. S. 494, 503. **Cf. Bailey v. Drexel Furniture Company**, 259 U. S. 20, 37-38.

The rule could hardly be otherwise: Unless the exercise of constitutionally guaranteed rights and immunities is presumptively favored, one seeking to exercise those rights in face of a limiting statute would be forced to overcome

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[8] *A. F. of L. v. Swing*, 312 U. S. 321, 325.

[9] *American Communications Asso. v. Douds*, 339 U. S. 382, 400; *West Virginia State Bd. v. Barnette*, 319 U. S. 624, 639; *Thornhill v. Alabama*, 310 U. S. 88, 95-96; *Schneider v. Irvington*, 308 U. S. 147, 161; *U. S. v. Carolene Products*, 304 U. S. 144, 152n.

[10] *Pennekamp v. Florida*, 328 U. S. 331, 347; *Craig v. Harney*, 331 U. S. 367, 373.

a presumption in favor of the restraint. Thus, without a presumption in favor of freedom of speech, restraint would become the rule rather than the exception. We believe, however, that the decisional history of this Court has firmly established freedom of expression as the rule and that a statute abridging free speech must be defended, if it can be defended, on its merits.

It is true that in this case the challenge is not to legislative power; rather the Unions here challenge the correctness of a judicial decision which was based upon the record now before this Court. Nevertheless, what has been said with regard to the position of free speech in relation to statutory action applies with greater force to the judicial action in the case at bar. For, when the restraint is imposed by judicial decision rather than legislative act, such a judgment does not come here "encased in the armor wrought by prior legislative deliberation." **Bridges v. California**, 314 U. S. 252, 261.

The fundamental importance of "[peaceful] picketing [which] is the workingman's means of communication" (**Drivers Union v. Meadowmoor Co.**, 312 U. S. 287, 293) to our industrial society cannot be doubted at this late date. Hence, restraints upon the "workingman's means of communication" should be the exception rather than the rule. Those who would sanction restraint have "a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case." **Burstyn v. Wilson**, 343 U. S. 495, 504. Nothing less than a "solidity of evidence should be required" if the Unions are to be deprived of the right to peaceful picketing. **Pennekamp v. Florida**, 328 U. S. 331, 347.[11] We believe that the record in the

[11] Here as in the *Pennekamp* case there was a verified denial of unlawful purpose. Such a denial operates as a "complete refutation of the charge." *Ladd v. Ladd*, 8 Howard (U. S.) 10, 28. Therefore, Vogt was obligated to demonstrate the alleged unlawful purpose "by a solidity of evidence . . . which would be difficult to find in this record." *Pennekamp v. Florida*, 328 U. S. 331, 347.

present case fails to afford evidence even tending to support a finding of unlawful purpose, let alone "a solidity of evidence," supporting such a conclusion.

III. This Court Has Consistently Held That Peaceful Picketing, at the Site of a Labor Dispute, in the Absence of Unlawful Demands, Is Protected Free Speech Under the First and Fourteenth Amendments.

"The First Amendment draws no distinction between the various methods of communicating ideas." **Superior Films v. Dept. of Education**, 346 U. S. 587, 589 (Douglas, J., concurring). Speeches,[12] door-to-door religious solicitations,[13] religious solicitations in privately[14] or governmentally owned towns,[15] union solicitations,[16] pamphlets,[17] a flag,[18] motion pictures,[19] and peaceful picketing,[20] all serve as vehicles of communication. For this reason each is entitled to the Constitution's protection.

We are here concerned with peaceful picketing which has been uniformly recognized by this Court since **Senn v. Tile Layers Union**, 301 U. S. 468, 478, as a means of pub-

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[12] *Kunz v. New York*, 340 U. S. 290; *Niemotko v. Maryland*, 340 U. S. 268; *Terminiello v. Chicago*, 337 U. S. 1.

[13] *Martin v. Struthers*, 319 U. S. 141; *Cantwell v. Connecticut*, 310 U. S. 296.

[14] *Marsh v. Alabama*, 326 U. S. 501.

[15] *Tucker v. Texas*, 326 U. S. 517.

[16] *Thomas v. Collins*, 323 U. S. 516.

[17] *Largent v. Texas*, 318 U. S. 418; *Jamison v. Texas*, 318 U. S. 413; *Schneider v. Irvington*, 308 U. S. 147.

[18] *West Virginia State Bd. v. Barnette*, 319 U. S. 624; *Stromberg v. California*, 283 U. S. 359.

[19] *Superior Films v. Dept. of Education*, 346 U. S. 587; *Gelling v. Texas*, 343 U. S. 960; *Burstyn v. Wilson*, 343 U. S. 495.

[20] "Peaceful picketing is the workingman's means of communication." *Drivers Union v. Meadowmoor Co.*, 312 U. S. 287, 293.

licizing the facts of a labor dispute which is entitled to the First Amendment's protection.[21] In **Carlson v. California**, 310 U. S. 106, 112-13, this Court said:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern." * * * [Publicizing] the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state."

It is, of course, acknowledged that the right to engage in picketing is not absolute.[22] Picketing enmeshed with violence as in **Drivers Union v. Meadowmoor**, 312 U. S. 287 and **Hotel Employees' Local v. Board**, 315 U. S. 437, affords the clearest situation in which restraint may be proper. Peaceful picketing at a place having no economic nexus with the labor dispute has not been accorded constitutional protection. **Carpenters Union v. Ritter's Cafe**, 315 U. S. 722. Nor has picketing having as its avowed purpose the violation of important state policies been held

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[21] Some of the more scholarly works on peaceful picketing include: Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180 (1942); Dodd, *Picketing and Free Speech: A Dissent*, 56 Harv. L. Rev. 513 (1943); *Picketing and Free Speech: A Reply*, 56 Harv. L. Rev. 532 (1943); Tanenhaus, *Picketing as a Tort*, 14 U. Pitt. L. Rev. 170 (1953); *Tanenhaus, Picketing—Free Speech*, 38 Cornell L. Q. 1 (1952). An excellent, though more general, treatment of the right to free speech is to be found in *Free Speech in the United States*, Zechariah Chaffee, Jr. (1941).

[22] Since picketing in some circumstances may be more than free speech, this Court has sanctioned its restraint when either the manner or purpose of the picketing is unlawful. Compare *Near v. Minnesota*, 283 U. S. 697, 713, 721, with *Hughes v. Superior Court*, 339 U. S. 460, 465-66.

to be beyond restraint. **Plumbers Union v. Graham**, 345 U. S. 192; **Building Service Union v. Gazzam**, 339 U. S. 532; **Teamsters Union v. Hanke**, 339 U. S. 470; **Hughes v. Superior Court**, 339 U. S. 480; **Giboney v. Empire Storage Co.**, 336 U. S. 490. But it must be here emphasized that each of the cases in the group last mentioned presented a record in which affirmative evidence of the unlawful goal appeared.

Of course, the very existence of exceptions serves to re-affirm the rule condemning blanket proscriptions of the right to engage in peaceful picketing. **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106. Equally settled is the principle—embodied in both the Norris-LaGuardia Act[23] and the Labor Management Relations Act[24]—that peaceful picketing may not be restrained merely because the labor dispute does not involve an employer and his employees. **Cafeteria Union v. Angelos**, 320 U. S. 293; **Bakery Drivers Local v. Wohl**, 315 U. S. 769; **A. F. of L. v. Swing**, 312 U. S. 321.

Since restraint of peaceful picketing conducted at the site of the dispute has been permitted by this Court only when the record before this Court affirmatively demonstrated the goal of the picketing to be contrary to an important state policy, we turn now to an analysis of the facts and the Wisconsin Supreme Court's opinion in this case.

IV. The Undisputed Evidentiary Facts Cannot Support a Finding of Unlawful Purpose.

The crucial **facts** are easily stated. The Unions solicited the membership of some of Vogt's non-union employees (R. 5, 8-11, 12, 16). The employees declined this offer (R. 5, 16). Thereafter peaceful picketing was commenced on

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[23] 29 U. S. C. 113 (c).

[24] 29 U. S. C. 152 (9).

a public road bordering their place of employment (R. 4, 12, 16). The picket sign proclaimed the non-union status of these employees (R. 4, 12, 16). Their employer was inconvenienced because some truck drivers refused to deliver to a non-union plant; however, Vogt used his own trucks to make deliveries (R. 5, 16). On these facts the court below concluded that the purpose of the picketing was to compel Vogt to interfere with his employees' right of self-organization.

In its original, unanimous opinion, the court below had little difficulty in concluding that:

> "**The testimony would not have supported a finding of the facts constituting a violation of either of the subsections** [Wis. Stat., Sec. 111.06 (2) (a-b)]. No threats were made against the plaintiff; no demands were made upon it. It does not appear that any of the defendants' representatives had even spoken to plaintiff's officers about their desire to organize its employees. There was no violence, no force and no threat of force, no disorder or physical obstruction to plaintiff's property. There was no evidence that defendants' representatives [fol. 36] had coerced or intimidated any of plaintiff's employees in their right to join or refuse to join either of defendant unions. **There was only peaceful persuasion exercised by the carrying of a banner bearing a truthful legend**" (R. 25). (Emphasis ours.)

A considerably more elaborate opinion on rehearing was required to spin out of the simple facts of this case a finding of sinister purpose.[25]

The crux of the reasoning in the rehearing opinion rendered by the court below is as follows: the "message car-

[25] The original opinion covers only six and a fraction pages in the present record (R. 22-28). The rehearing opinion, exclusive of the dissent, required eleven pages (R. 30-41).

ried upon the Unions' banner" was not for the "enlightenment" of Vogt's employees because their membership had been previously solicited (R. 36). The court below then assumed that the public road upon which the picketing was conducted was "ordinarily patronized by only a small part of the public";[26] hence the picketing was not "intended for the guidance of the community" (R. 36). Thus the "only purpose" of the picketing:

> "was to influence those who were engaged in transporting . . . materials to and from plaintiff's place of business and that it was conducted in the hope that these persons would refuse to continue to serve plaintiff and thereby compel it to choose between two alternatives—permit the continuance of the picketing and suffer the consequent loss of profits and **possibly of its business,**[27] or by some means or other to coerce or intimidate plaintiff's employees to join one of the Unions, and thereby violate the provisions of Sec. 111.06 (2) (b) Stats."[28] (R. 36). (Emphasis ours.)

Following the analysis of the court below, we turn first to the solicitations which preceded the peaceful picketing.

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[26] The record is devoid of any evidence regarding the movement of traffic on the public road in question.

[27] The Trial Court, adopting the allegations of the complaint (R. 5), found that "the drivers of several trucking companies have refused to deliver . . . goods . . . to and from plaintiff's premises . . . resulting in great inefficiency, inconvenience, extra labor and expense . . ." (R. 16). Compare: *Schneider v. Irvington*, 308 U. S. 147, 162.

[28] Section 111.06 (2) (b) makes it an unfair labor practice:

> "To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative."

A. Solicitation of Union Membership, Whether Considered Alone or in Conjunction With Subsequent Peaceful Picketing, Will Not Support a Finding of Unlawful Purpose.

The decision of this Court in **Thomas v. Collins**, 323 U. S. 516, and the many decisions involving the solicitations by colporteurs establish beyond question that the solicitations engaged in by representatives of the Unions in the instant case were themselves an exercise of constitutionally-guaranteed rights. In the **Collins** case an order restraining the Petitioner from speaking at a union organizational meeting had been issued. The Petitioner made both a general solicitation of the audience as well as a specific solicitation of a named individual at the meeting. In striking down the subsequent contempt conviction, this Court stated (323 U. S. at 532, 537-38):

> "The right thus to discuss and inform people concerning the advantages and disadvantages of unions and joining them is protected not only as a part of free speech but as part of free assembly."
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> * * * * * * *
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> ". . . decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. . . . The Constitution protects no less the employees' converse right."

The court below excluded the non-union employees of Vogt from the possible audience sought to be reached by the picketing. It did this by assuming that since the Unions had already solicited their membership, the picket line could not be intended to persuade them to action. Implicit in this assumption is the utterly untenable position that, having exercised the constitutional right to solicit membership, the Unions were thereafter precluded from using any other method of communication guaranteed

under the First Amendment in order to persuade non-union employees of the advantages of union membership.

Carried to its logical extreme, the court below would necessarily reason that direct solicitation of non-union employees could be restrained if the Unions had previously distributed pamphlets to those employees, and that pamphleteering could be restrained if the Unions had previously published a newspaper ad. This Court has never suggested that the First Amendment contains an "election of remedies" clause.

The court below would couple the fact of solicitation with the fact of picketing and, by setting up a restricted number of possible goals, reach the conclusion that the picketing was not for the "enlightenment" of Vogt's non-union employees. Thus the court would couple the exercise of two constitutionally-guaranteed rights, that is, peaceful picketing and solicitation of employees, and conclude that the Unions had an unlawful purpose.[29] This is precisely the type of reasoning condemned in **Thomas v. Collins**:

> "Here, speech admittedly otherwise beyond the reach of the states is attempted to be brought within its licensing system by associating it with 'solicitation.'" 323 U. S. at 547. (Jackson, J., concurring.)

In another context, this Court has similarly condemned "the practice of imputing a sinister meaning to the exer-

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[29] If any inference can be drawn from the fact of solicitation the only inference which bears any logical relationship to the fact proved is that the Unions desired the employees of Vogt to affiliate with them. And it is a matter of hornbook law that there must be "an immediate connection" between the inferred fact and the proven fact. *Manning v. Mutual Life Ins. Co.*, 100 U. S. 693, 697-98. See also: *Tot v. United States*, 319 U. S. 463, 467-68; *Looney v. Metropolitan R. Co.*, 200 U. S. 480, 488. "In any event, rules of evidence as to inferences from facts are to aid reason, not to override it." *Maggio v. Zeitz*, 333 U. S. 56, 66.

cise of a person's constitutional rights." **Slochower v. Board of Ed. of N. Y.**, 100 L. Ed. (Adv.) 449, 454. To paraphrase, the constitutional right to engage in peaceful picketing and the equally protected right to solicit the membership of non-union employees "would be reduced to a hollow mockery if [their] exercise could be taken as equivalent . . . to a confession of" an unlawful purpose. Id., at 454. The **Slochower** case came before the court in the context of the Fifth Amendment. Nevertheless, the reasoning of that case is, we believe, highly persuasive in the case at bar. For if state courts are allowed to couple the exercise of two constitutionally guaranteed rights and then spin an all-enveloping web of inferences from the exercise of these two rights, they have indeed made a "hollow mockery" of the exercise of rights guaranteed by the First and Fourteenth Amendments.

B. The Situs of the Picketing Does Not Support a Finding of Unlawful Purpose.

The peaceful picketing in this case occurred on "Town Road P" in the Town of Oconomowoc, Waukesha County, Wisconsin (R. 4, 12, 16). The road is a public road (R. 3, 12, 16). A private driveway leading from this public road connects Vogt's gravel pit to the Town Road (R. 3, 12, 16). There was no interference at any time with persons desiring to enter or leave the gravel pit (R. 25).

The court below went to great lengths to demonstrate in its second opinion that the situs of the picketing afforded considerable support for its conclusion that the picketing was for an unlawful purpose. The principal strand in its inferential web is that since the picketing occurred on a "lightly traveled" road, the picketing could not be intended for the "guidance of the community" (R. 36). Thus, the Wisconsin court seeks to impose a "traffic count" test by which the right to free speech is to be measured.

Assuming that the court below was correct in concluding that the number of people who would have occasion to see the picket sign would not be great, the conclusion drawn from this fact must, nevertheless, be rejected. It would be an extremely unusual constitutional doctrine which would deny to a speaker his constitutional freedom of speech because of the limited size of his audience. Typically, the speaker-representative of a minority group reaches only a few persons. It is for this reason that particular care has been taken in cases involving representatives of minority groups; it is they who most need the protection of the Constitution. **Cf. Martin v. Struthers**, 319 U. S. 141, 146; **Thornhill v. Alabama**, 310 U. S. 88, 104.

Just as no "suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the" importance of the idea expressed (**Bridges v. California**, 314 U. S. 252, 269), similarly there can be no such suggestion with respect to the size of one's audience. Insofar as the size of one's audience has been relevant to the question of whether or not his speech is constitutionally protected, the decisions of this Court make it quite clear that it is only when the size of the audience is artificially **increased** that restraint may be appropriate. **Compare: Kovacs v. Cooper**, 336 U. S. 77, with **Saia v. New York**, 334 U. S. 558. **Cf. Grosjean v. American Press Co.**, 297 U. S. 233.

Finally, it cannot be validly argued that the Unions by picketing on the public road bordering the situs of the dispute chose an inappropriate forum.[30] For as this Court stated in **Thornhill v. Alabama**, 310 U. S. 88, 105-06:

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[30] The fact that the picketing in the case at bar occurred at the situs of the dispute, i. e., the Town Road bordering the place of employment of the non-union employees, eliminates from this case any question of "secondary" activity. The refusal of some truck drivers to cross the picket line does not alter the primary nature of

"'[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' **Schneider v. State,** 308 U. S. 147, 161, 163."

Accord: Jamison v. Texas, 318 U. S. 413, 416.

We urge that this Court unequivocally reject any suggestion that peaceful picketing loses its status as free speech simply because its possible auditors or viewers may be few in number.

C. The Language of the Picket Sign Does Not Support a Finding of Unlawful Purpose.

In discussing the purpose of the Unions, the court below referred to the language of the picket sign (R. 36). It failed to consider that, in addition to the particular language used on the signs, a workingman carrying a picket sign is the traditional symbol of the existence of a labor dispute. The sign which he carries seeks to inform interested persons of the nature of the dispute.

Recognition of the fact that a workingman carrying a picket sign symbolizes the existence of a labor dispute in no way detracts from the Unions' claim to constitutional immunity. A symbol of this type is entitled to the same constitutional protection accorded any other form of communication. **Stromberg v. California,** 283 U. S. 359. **See also: West Virginia State Bd. v. Barnette,** 319 U. S. 624, 632.

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the dispute. *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665. See also: *Pure Oil Company*, 84 N. L. R. B. 315. Compare: *Admin. Dec. of the General Counsel* (N. L. R. B.), Case No. 1008, 34 LRRM 1512; Case No. 840, 33 LRRM 1037; Case No. 739, 32 LRRM 1464.

The signs in this case clearly informed those caring to read them that the non-union status of the employees of Vogt was the cause of the dispute; for the sign read:

> "The men on this job are not 100% affiliated with the A. F. L." (R. 4, 12, 16).

Surely nothing in such language denotes a sinister purpose.

The truthfulness of the picket sign is undisputed (R. 25). Although the Unions might have chosen language which more clearly evidenced the fact that their picketing was in furtherance of their solicitation and to gain public support, neither vagueness nor extravagance of language is a basis for restraint. **Compare: Cafeteria Union v. Angelos,** 320 U. S. 293, 295; **Nann v. Raimist,** 255 N. Y. 307, 174 N. E. 165. In any event, it is clear that the decision of the Wisconsin court was not based on any inference drawn from the language of the picket sign.

D. Potential or Actual Economic Loss to the Employer Does Not Support a Finding of Unlawful Purpose.

The court below acknowledged that financial loss alone would not justify the issuance of an injunction in a labor dispute (R. 40). However, it is apparent that the court's conclusion of "unlawful purpose" was bottomed in great measure on its concern that such loss might induce the employer to violate the law (R. 36). Accordingly, in a classic example of *a priori* reasoning, it attributed to the Unions the purpose of inducing such unlawful actions by the employer (R. 37). As Professor Chaffee puts it:

> "The *reductio ad absurdum* of this theory was the imprisonment of Joseph Palmer, one of Bronson Alcott's fellow-settlers at 'Fruitlands,' not because he was a communist, but because he persisted in wearing such a long beard that people kept mobbing him, until

law and order were maintained by shutting him up. A man does not become a criminal because some one else assaults him, unless his own conduct is in itself illegal or may be reasonably considered a direct provocation to violence." **Free Speech in the United States**, Zechariah Chaffee, Jr., pp. 151-52 (1941).

Cf. Feiner v. New York, 340 U. S. 315, 326-27 (Black J., dissenting).

Economic loss to the employer of the non-union employees does not aid those who would contend that peaceful picketing is not entitled to the First Amendment's protection. First of all, when considering whether those who have the burden of proving that peaceful picketing is not entitled to constitutional protection have met their burden, the fact of economic loss or injury is relevant only to the right to invoke the jurisdiction of the courts. Proof of economic loss in no way demonstates the illegality of the conduct any more than it operates to rebut the constitutionality of a statute. **See, e. g., Bordens Farm Products Co. v. Baldwin**, 293 U. S. 194; **Rast v. Van Deem & Louis**, 240 U. S. 342; **Lindsey v. National Carbonic Gas Co.**, 220 U. S. 61.

In numerous cases coming before this Court which have involved the exercise of First Amendment guarantees, it has been recognized that the goal of speech is to persuade others to action. **Thomas v. Collins**, 323 U. S. 516, 537; **Lovell v. Griffin**, 303 U. S. 444, 452; **Ex Parte Jackson**, 96 U. S. 727, 733. **Cf. Hague v. Committee for Industrial Organization**, 307 U. S. 496, 512. The classic statement of this proposition is found in **Thornhill v. Alabama**, 310 U. S. 88, 104, where this Court, striking down a statute broadly proscribing the right to peacefully picket, stated:

"It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advanta-

geous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interest."

Indeed, throughout the history of the free speech cases in this Court, the effectiveness of a given method of communication has been a ground for commending it rather than condemning it. **Martin v. Struthers**, 319 U. S. 141, 145; **Schneider v. Irvington**, 308 U. S. 147, 164; **Superior Films v. Department of Education**, 346 U. S. 587, 589 (Douglas, J., concurring).

It is a matter of common knowledge that, by the establishment of a picket line, a union seeks to enlist the support of those sympathizing with its cause. In the case at bar, the record indicates that some truck drivers chose to honor the picketline (R. 16). The refusal of these truck drivers to cross a picketline maintained in part by a truck drivers union constitutes the grand total of economic pressure resulting from the picketing. A "right to a 'remedy' against the lawful conduct of another" does not arise merely because of incidental economic loss.[31] **Senn v. Tile Layers Union**, 301 U. S. 468, 483. **Thornhill v. Alabama**, 310 U. S. 88, 104.

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[31] Furthermore, the court below ignored the fact that in our industrial society economic loss incidental to competition between non-union and organized employees is a two-way street. Compare: *Thornhill v. Alabama*, 310 U. S. 88, 103; *American Steel Foundries v. Tri-City Council*, 257 U. S. 184, 209-210; *Duplex Printing Co. v. Deering*, 254 U. S. 433, 482 (Brandeis, J., joined by Justices Holmes and Clark dissenting); *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 157 N. E. 30.

E. There Is No Claim or Proof That Any Unlawful Demands Were Made of Vogt.

The complaint (R. 3-7) which initiated this action in the courts below contains not a single allegation of unlawful act or demand. Affidavits (R. 8-11) accompanying the complaint merely aver that the Unions solicited the membership of Vogt's employees. Finally, no **facts** were found by the courts below which even suggest that a demand of any kind was made of Vogt. **Compare: Plumbers Union v. Graham**, 345 U. S. 192, 198-99; **Building Service Union v. Gazzam**, 339 U. S. 532, 533-35; **Teamsters Union v. Hanke**, 339 U. S. 470, 472-74; **Hughes v. Superior Court**, 339 U. S. 460, 461; **Giboney v. Empire Storage Co.**, 336 U. S. 490, 492. Only by compounding possibilities and ignoring the record before it did the court below conclude that the picketing was for an unlawful purpose.

Whether the record in this case is considered in its entirety or in its various parts, we submit that Vogt did not begin to meet its "heavy burden" of demonstrating that the picketing was carried on for an unlawful purpose.

V. The "Unlawful Purpose" Doctrine Was Used by the Wisconsin Court to Accomplish the Same Result Which the Swing and Wohl Cases Prohibit.

In this case, the Wisconsin Court has undertaken, in substance and effect, to restrain peaceful picketing merely because no employer-employee dispute existed.[32] This was accomplished by concluding, as a matter of law that such picketing is for the purpose of coercing an employer into

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[32] Other state courts have done substantially the same. See, e. g.: *Chucales v. Royalty*, 164 Ohio St. 254, 129 N. E. 2d 823; *Bellerive Country Club v. McVey* (Mo.), 284 S. W. 2d 492; *Spokane Building and Construction Trades Council v. Audubon Homes*, 149 Wash. Dec. 144, 298 P. 2d 1112, cert. filed Dec. 10, 1956.

interfering with his employees' right of self-organization.[33] Thus, the court below stated:

> "**Pappas v. Stacey** [151 Me. 36, 116 A. 2d 497, **appeal dism'd** 350 U. S. 870] was a case strikingly similar in facts. There was peaceful picketing conducted for the purpose of seeking to organize non-union employees. There was no dispute between the employer and his employees. The plaintiff had suffered and would continue to suffer in his business as a result of the picketing. The court held that the picketing was conducted for an unlawful purpose, in violation of a statute which contains provisions quite similar to those with which we are concerned. . . ." (R. 38).
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> "The parties had stipulated that the picketing was conducted for the sole purpose of seeking to organize employees of the plaintiff but the court supplied the finding, as we do here, that the purpose of the picketing was to coerce the employer to bring pressure upon the employees to join the Union. . . ." (R. 38-39).

Surely the above does not constitute a finding of unlawful purpose;[34] rather, in view of the court's insistence that

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[33] In recent years distinctions have been drawn in the literature of industrial jurisprudence, and by some state courts, between "organizational" and "recognition" picketing. Picketing directed only at the employees has been called organizational picketing and therefore for a lawful purpose. Picketing directed at the employer in pursuance of a demand made for recognition of the union as the collective bargaining agent has been called recognition picketing. When the union does not represent a majority of the employees, recognition picketing is held to be for an unlawful purpose. Although these terms provide a convenient, short-hand method of classifying the *results* of decided cases, they do not necessarily provide a test comporting with decision in this Court. For the publication of the facts of a labor dispute through peaceful picketing at the site of the dispute can be restrained only when an unlawful purpose has been established. And, as we have demonstrated, no unlawful purpose has been established in this case.

[34] Section 8 (b) (2) of the LMRA and Section 111.06 (2) (b) of the Wisconsin Statutes make it an unfair labor practice for a union to coerce an employer into interfering with his employees' right of

it may supply a finding of unlawful purpose as a matter of law even if the parties have stipulated otherwise, it must be considered a declaration that peaceful picketing, in the absence of an employer-employee dispute, is not entitled to constitutional protection.[35] This Court held pre-

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self-organization. The General Counsel of the N. L. R. B. has consistently refused to issue a complaint against peaceful picketing in substantially similar cases to that at bar. See: *Admin. Dec. of the General Counsel* in Case No. 1008, 34 LRRM 1512; Case No. 840, 33 LRRM 1037; Case No. 739, 32 LRRM 1464. See also: Case No. 1133, 35 LRRM 1533. Several state courts have refused to find such picketing to be for an unlawful purpose. See, e. g.: *Painters Union v. Kountree Corp.*, 194 Va. 148, 72 S. E. 2d 402; *Wood v. O'Grady*, 307 N. Y. 532, 122 N. E. 2d 386; *Ira Watson v. Wilson*, 187 Tenn. 402, 215 S. W. 2d 801; *Whitehead v. Miami Laundry Co.*, 160 Fla. 667, 36 So. 2d 382; *Self v. Wisner* (Ark.), 287 S. W. 2d 890; *International Union of Operating Engineers v. Utah Labor Relations Board*, 115 Utah 183, 203 P. 2d 404. See also: *Edwards v. Virginia*, 191 Va. 272, 60 S. W. 2d 916.

[35] *City of Waukesha v. Plumbers Local No. 75*, 270 Wis. 322, 71 N. W. 2d 416, nominally held Sec. 103.535, Wis. Stat. (1953), reproduced in note 1, *supra*, unconstitutional. But in so doing the Wisconsin Supreme Court principally relied upon the original opinion in the case at bar which was subsequently withdrawn (R. 30).

The court below in its rehearing opinion apparently concluded that *A. F. L. v. Swing*, 312 U. S. 321, is no longer the law of the land, for it stated:

> "It would appear from this entry [dismissal of the appeal in the *Pappas* case] that the Court dismissed the appeal because no federal question was presented, suggesting that the Court did not consider itself bound by the rule of the *Swing* case which, when this case was first studied by us, we considered as requiring reversal" (R. 40).

This is merely another example of the extremes to which the court below is willing to go in drawing "inferences." But as Justice Currie, dissenting in the court below, pointed out:

> "In the *Pappas Case*, three employees of the plaintiff employer had gone on strike in an attempt to induce the employer to recognize the union and joined in the picketing. This in itself afforded adequate proof that the picketing had the unlawful objective of seeking to cause the employer to take action to coerce his employees into joining the union, and the court so held. In addition, the court also held that even if the picketing were solely for organizational purposes it could be enjoined. *Thus the decision found that the picketing could be enjoined*

cisely to the contrary in **Bakery Drivers' Local v. Wohl**, 315 U. S. 769, and **A. F. of L. v. Swing**, 312 U. S. 321. In both cases the state court had restrained peaceful picketing because no "labor dispute" as defined by state law existed. Both decisions were reversed. This Court stated in the **Swing** case (312 U. S., at 326):

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits are defined by statute or by the judicial organ of the state."

And in the **Wohl** case it was held that (315 U. S., at 774):

> ". . . one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive."

These decisions, then, expressly prohibit the several states from enjoining peaceful picketing merely because non-union employees have no dispute with their employer.

But, as we have stated, we are here concerned with an effort to accomplish the same result through the device of a finding that when the employees at the establishment at which the picket is placed are not members of the picketing union, the picketing, as a matter of law, can be only for the sole purpose of coercing the employer to unlawfully interfere with the right of such non-union employees to remain non-union. Thus it was the absence of presently existing representation rights in the Unions which provided the basis for the determination of the legality of the

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on two grounds, the first of which had been upheld by prior decisions of the United States Supreme Court, and the second of which has not been" (R. 45-46). (Emphasis ours.)

peaceful picketing. This approach, as we have pointed out, ignores completely the presence of the same simple communication aspects in such picketing as are present in picketing during the course of a dispute between an employer and his own employees—communication of the existence and nature of the dispute.

Those courts which would designate such communication aspects of peaceful picketing as unlawful economic coercion directed to the employer of the non-union employees for the purpose of inducing his violation of law are merely seeking to keep alive the fiction, shattered by the **Swing** case, supra, that "the right of free communication" exists only in a dispute between "an employer and those directly employed by him."

Such courts ignore the very real dispute which grows out of the competition of the non-union employee with the union employee and the equally urgent need for publication of the facts of such dispute. It was Justice Brandeis, joined by Justices Holmes and Clark, dissenting in **Hitchman Coal & Coke Company v. Mitchell**, 245 U. S. 229, 271, who early answered such argument by pointing out:

> "It is urged that defendants are seeking to 'coerce' plaintiff to 'unionize' its mine. But coercion, in a legal sense, is not exerted when a union merely endeavors to induce employees to join with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in a legal sense."

Cf. **Gompers v. Bucks Stove Range**, 221 U. S. 418, 439.

Although Justice Brandeis wrote for the minority in the **Hitchman Coal** case, it was his view which decisional history has vindicated. For in **Building Service Union v.**

Gazzam, 339 U. S. 532, 539-40, this Court was careful to point out:

> "The Washington statute has not been construed by the Washington courts in this case to prohibit picketing of workers by other workers. The construction of the statute which we are reviewing only prohibits coercion of workers by employers. * * * There is no contention that picketing directed at employees for organizational purposes would be violative of that policy. The decree does not have that effect."[36]

If in the case at bar the Unions had placed an ad in a local paper proclaiming the non-union status of Vogt's employees, we submit that under no circumstances would this Court tolerate a restraint upon the publication, either prior or subsequent. See **Plumbers Union v. Graham**, 345 U. S. 192, 202 (Douglas, J., dissenting); Dodd, Picketing and Free Speech: A Dissent, 56 Harv. L. Rev. 513, 515-16 (1943). And if the same truck drivers had refused to enter Vogt's gravel pit because of the advertisement in the paper the result would not be changed. The Unions in the case at bar did no more than publicize the non-union status of Vogt's employees. Whether they did this through the medium of a newspaper, a pamphlet or by peaceful picketing cannot be controlling, because each is a constitutionally protected mode of communication.

CONCLUSION.

Bakery Drivers Local v. Wohl, 315 U. S. 769, and **A. F. of L. v. Swing**, 312 U. S. 321, placed before this Court records in which peaceful picketing occurred at a place where

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[36] "The patience of the Supreme Court may not be expected to endure injunctions restraining picketing carried on for shorter hours, for collective bargaining, or for organizing establishments." Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180, 209 (1942). See also *Papas v. Local Joint Executive Board*, 374 Pa. 34, 96 A. 2d 915.

no employer-employee dispute existed. In both cases the peaceful picketing was preceded by solicitation of the non-union employees. In holding the picketing in the **Wohl** case to be constitutionally protected, this Court stated (315 U. S., at 775):

> "[There] are no findings and **no circumstances from which we can draw the inference** that the publication was attended or likely to be attended by violence, force or coercion or conduct otherwise unlawful or oppressive." (Emphasis ours.)

We believe the **Swing** and **Wohl** decisions to be dispositive of the issues here presented. The findings of the court below were, in every sense of the words, "spurious," "insubstantial," and screened reality. **Drivers Union v. Meadowmoor**, 312 U. S. 287, 293, 299. Its decision constitutes a patent disregard of the unambiguous holdings of this Court in the **Swing** and **Wohl** cases. We therefore respectfully request that this Court reverse the judgment of the court below.

Respectfully submitted,

DAVID PREVIANT,
511 Warner Theatre Building,
Milwaukee 3, Wisconsin,
Counsel for Petitioners.

Of Counsel:

PADWAY, GOLDBERG & PREVIANT,
DAVID LEO UELMEN,
HUGH HAFER,
511 Warner Theatre Building,
Milwaukee, Wisconsin.